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No. 659

In the Supreme Court of the United States

OCTOBER TERM, 1967

STEPHEN R. EAGAR, ET AL., *Petitioners*

vs.

MAGMA COPPER COMPANY

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Non-veteran employees of respondent are not permitted, either by the Collective Bargaining Agreement or respondent's practice, to receive credit for time on furlough in determining their eligibility for either vacation or holiday benefits.

The question presented is whether Section 9 of the Selective Training and Service Act of 1940 permits veterans to receive credit for military service in determining their eligibility for vacation or holiday benefits even though non-veterans on furlough cannot receive such credit.

STATEMENT

Petitioners were employed by respondent, Magma Copper Company, in positions other than temporary. While still in respondent's employ, each of the petitioners left the service of respondent as furloughees to enter the Armed Forces of the United States. After receiving a certificate evidencing his satisfactory completion of his period of training and service, each petitioner returned to his former position with respondent.

At all times involved, Collective Bargaining Agreements between respondent and petitioners' bargaining representative governed the conditions of employment. Under the labor agreements, in order to be eligible for vacation pay (1) an employee must have worked at least 75% of his available shifts within his vacation year, and (2) must have been in the service of the Company on his anniversary date. With respect to holiday pay, the agreements provided that in order to be eligible (1) an employee must have worked his last scheduled shift prior to the holiday and his first scheduled shift after the holiday (unless he had an acceptable excuse) and (2) the employee must have been on the Company's payroll continuously for three months prior to the holiday in question.[1]

As petitioners have indicated, Eagar's case is fairly representative of the other claimants. He was employed on March 12, 1958 and entered the Armed Forces on March 6, 1959. Prior to his leaving the service of respondent, he had worked more than 75% of the shifts available in his vacation year; however, he left the service of the Company before his anniversary date of hiring. In accordance with the Collective Bargaining Agreement, he was not given vacation pay. Eagar returned to the service of respondent

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1. Pertinent provisions of Agreement are in Pet. for Cert., App. pp. 13-14.

on May 2, 1962 and worked his last scheduled shifts prior to and his first scheduled shifts after the 1962 Memorial Day and Independence Day holidays. However, he was not continuously on the payroll of respondent for three months prior to the holidays in question. In accordance with the Collective Bargaining Agreement, he did not receive holiday pay for those holidays.

Petitioners brought suit in the District Court to recover vacation pay and holiday pay, contending that the Universal Military Training and Service Act entitled them to be treated as having been continuously at work with respect to eligibility to holiday and vacation pay.

The United States District Court for the District of Arizona granted judgment for petitioners on their motion for summary judgment. The United States Court of Appeals for the Ninth Circuit reversed the District Court's decision. (380 F.2d 318, quoted in the Pet. for Cert., App. pp. 13-17) Petitioners sought rehearing and the Court of Appeals for the Ninth Circuit denied the petition. (Quoted in Pet. for Cert., App. pp. 18-20)

REASONS FOR DENYING WRIT

There is no conflict between the Ninth Circuit's decision in this case and the decisions of this Court, or the decisions of any other court of appeals.

1. *Accardi v. Pennsylvania R. Co.*, 383 U.S. 225 (1966)

Petitioners base their application for a writ principally on a contention that the decision below is directly contrary to this Court's decision in the *Accardi* case. However, there is no such conflict. The two cases are quite distinct.

The *Accardi* case involved the computation of severance benefits when certain jobs were abolished by the railroad company more than fifteen years after the veterans in-

volved returned from World War II. Respondent railroad company in that case deducted time spent in the Armed Forces in the computation of severance pay. This Court found that the real nature of such severance payments was compensation for loss of jobs. The amounts of the severance payments were based primarily on seniority so that under the Act time spent in the Armed Forces should have been included. The Court found that these severances were just as much a prerequisite of seniority as the order of layoff and recall.

Our case does not involve computation of severance or pension benefits based on seniority. It concerns the eligibility for vacation and holiday pay. These benefits are earned by service for the Company similar to wages and are in no sense compensation for loss of jobs such as severance or pension benefits.

The contract here expressly provides that the amount of vacations is determined by seniority but that *eligibility* for vacations and holidays is determined by payroll status. Petitioners had left the payroll of the Company so did not have such status.

In the instant case, the veterans were given full seniority credit for time spent in the Armed Forces in determining the amount of subsequent vacations. The Collective Bargaining Agreement specifically states that furloughees to the Armed Forces will, upon return to work, be allowed credit for time spent in the Armed Forces as time worked in determining the vacation amounts. Thus, Eagar, who was employed in 1958 and was in the Armed Forces from 1959 to 1962, was upon his return considered a four-year employee rather than a one-year employee in future vacation computations as though he had never left the employment of respondent. This point was never in dispute in the case

at hand. Therefore, we cannot agree with petitioners' contention that our case is directly contrary to *Accardi*. The Company's practice was absolutely consistent with the ruling in the *Accardi* case.

In our case, petitioners are claiming credit for time spent in the Armed Forces in determining eligibility for vacations and holidays just as though they had been at work. This contention has been answered without conflict by various courts of appeals.

Our case is quite similar to *Siaskiewicz v. General Electric Co.*, 2 Cir. (1948) 166 F.2d 463. In that case, as here, the labor agreement expressly provided that length of vacation was determined by seniority but that eligibility for vacations was determined by payroll status. Petitioners did not have such status. The argument advanced in that case, as here, was not that the veterans were deprived of seniority. Instead, they reasoned that but for their service in the Armed Forces the veterans would have been at work for respondent and had they been at work they would have had payroll status and would have been entitled to vacation pay. They claimed that for purposes of vacation pay the veterans should be treated as if they had been at work for respondent during the period they were in the Armed Forces.

The Second Circuit, in *Siaskiewicz*, said:

> "* * * Since vacation rights are not pay unless they are for work actually done, and since they are not merely a prerequisite of seniority, they must fall under the heading of 'other benefits.' Hence, under the language of the Act, appellants must be treated like non-veteran employees on furlough or leave of absence. But non-veteran employees of appellee who were on leave of absence * * * would not be entitled to vacation pay for that year. Therefore, appellants are not so entitled. To grant them such pay would be to discriminate in

favor of them as veterans, and against non-veteran employees. That discrimination in favor of veterans is as foreign to the purposes of the Act as discrimination against them, the Supreme Court decided when it passed on the issue of 'super-seniority'." (166 F.2d at Pages 465-466)

Judge Learned Hand stated in *Dwyer v. Crosby Co.*, 2 Cir. (1948) 167 F.2d 567:

"• • • Although it was unlawful to attempt by contract to provide that a veteran should be deemed not to be 'in the employ' of the company while he was serving in the Army, it was not unlawful to deny him vacation, unless it was an 'established rule of the company' to give vacation to those who were on 'leave of absence'."

"• • • *obviously the considerations which might make it proper that service in the Army should not affect a man's seniority are utterly different from those which should count in computing vacations.*" (Emphasis added) (167 F.2d at Pages 569-570)

Section 9(c)(1) of the Act provides:

"(c)(1) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) (of this section) shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, *shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence.*" (Emphasis added)[2]

Under the Collective Bargaining Agreements and established practice of respondent, non-veteran employees on

2. Universal Military Training and Service Act, as amended, 62 Stat. 614, as amended, 50 U.S.C., App. 459.

furlough are not permitted to count time off the payroll in determining eligibility for vacations or holidays. The veteran furloughees were treated the same as the non-veteran furloughees and are not entitled to more under the Act.

Many labor agreements do not require a minimum number of shifts in determining eligibility but still require continuity of payroll status in order to qualify for vacations or holidays. Under such agreements, petitioners' argument would mean that veteran furloughees should be entitled to all vacations, holidays and other fringe benefits, which they would have received but for their entering the Armed Forces, even though non-veteran furloughees would not be eligible for such benefits. Such bizarre results are not required under the Act.

Petitioners also assert that the decision below is in direct conflict with the decisions of the Third Circuit in *Mentzel v. Diamond*, 3 Cir. (1948) 167 F.2d 299, and *MacLaughlin v. Union Switch & Signal Co.*, 3 Cir. (1948) 166 F.2d 46. There is no such conflict and those two cases are quite distinguishable.

The *Mentzel* case deals with the amount of vacations to be granted veterans subsequent to their return. The Company in the *Mentzel* case did not credit time spent in the Armed Forces in computing the amount of vacations after the veterans returned. The basis for that suit was similar to the dispute regarding computation of severance allowance in the *Accardi* case. But, as we have already noted, there is no dispute in our case regarding this point. Under our union contract and consistent practice, the veterans, upon their return, were granted full credit for time spent in the Armed Forces in computing the amount of future vacation allowances.

The *MacLaughlin* case involves a unique contractual provision under which employees actually earned vacations as they worked during the year. It appears from that contract that furloughees would receive vacation pay and the Court ruled that veteran furloughees should be placed in the same status as the non-veteran employees as to vacation rights.

> "It would require a strained interpretation of the statute not to place veterans in pari passu with non-veteran employees as to vacation rights, if such rights are due the veteran under the contract.
>
> "• • • we are adjudicating only the question of vacation rights granted under specific contracts." (166 F.2d 46 at Page 49)

The Third Circuit, a year later, in *Dougherty v. General Motors Corporation,* 3 Cir. (1949) 176 F.2d 561 (Cert. den. 338 U.S. 956, 94 L.Ed 590, 70 S.Ct. 494), pointed out the distinction in the *MacLaughlin* case and consistent with the ruling in the case at hand stated:

> "However desirable and feasible some modification of the provision by the parties themselves might have been, we cannot impose as a legal requirement a vacation provision other than that on which the bargainers agreed, as long as the intent and operation do not place veterans in a position inferior to that of non-veterans on leave of absence."

We know of no courts of appeals' decisions contrary to the decision in our case. See similar reasoning in: *Alvado v. General Motors Corp.,* 2 Cir. (1955) 229 F.2d 408 (Cert. den. 351 U.S. 903); *Brown v. Watt Car & Wheel Co.,* 6 Cir. (1950) 182 F.2d 570 (Cert. den. 340 U.S. 875, 95 L.Ed. 636, 71 S.Ct. 121); *Borges v. Art Steel Co.,* 2 Cir. (1957) 246 F.2d 735.

2. The decision below will not cause any widespread problems in the application of the re-employment provision of the Universal Military Training and Service Act. Other courts of appeals over the past twenty years have given rulings similar to this one without creating any apparent problems. Petitioners have noted that they are informed by the Labor Department that there are a number of vacation and holiday pay claims since the Ninth Circuit decision in this case. We see no significance in the number of cases which the Veterans Administration and Labor Department may have accumulated and suspect that those cases are not similar to our case, but are actually like the *Mentzel* and *Accardi* cases which involve a distinct principle which is not in dispute in this case.

CONCLUSION

For the foregoing reasons, we respectfully request that the Writ of Certiorari be denied.

Respectfully submitted,

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